COMPTROLLER-GENERAL OF INLAND REVENUE

v.

LIM FOO YONG SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH CJ (MALAYA)
SALLEH ABAS FJ
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 73 OF 1979]
7, 8 JULY & 14 AUGUST 1982

REVENUE LAW: *Income from business activities - Gains or profits from trade or business - Whether respondent was trading or carrying on a business - Question of fact - Finding by Special Commissoners.*

This was an appeal against the decision of the learned Judge revising the order of the Special Commissioners who, in affirmation of the findings of the Comptroller-General of Inland Revenue, ruled that the respective sums of RM2,622,510, RM4,201,000, RM494,000 and RM288,332.62 allegedly earned by the respondent were profits from trade and therefore chargeable to tax under s. 10(1) of the Income Tax Ordinance 1947. The facts were that in 1956 the respondent had purchased five pieces of land at Jalan Treacher, Kuala Lumpur, and had built thereon the so called Hotel Merlin (the hotel properties) at a cost of RM2,377,490. Two companies were involved in the management of the hotel properties, namely, Hotel Merlin Ltd in which the respondent had a 90% interest in the form of 98,000 of its fully paid-up shares, and Harlequin Ltd in which the respondent held a 50% interest.

In 1962, the respondent entered into three simultaneous agreements with the Employees Provident Fund Board (the EPF Board) wherefore he respectively (i) sold the hotel properties to the EPF Board for RM5,000,000 (ii) secured the right to repurchase the hotel after 10 years at the same price and (iii) had the hotel leased to him by the EPF Board. Apparently, by the sale of the hotel properties here, some RM2,622,510 profit had accrued to the respondent.

Some 14 months later, the respondent entered into an agreement with a company called Merlin Hotels Malaysia Ltd (the hotel company) whereby the respondent sold to the hotel company its lease and its rights to repurchase the hotel properties. The sale of the rights to repurchase was for a total consideration of RM4,201,000, and this was satisfied by the issue to the respondent of 4,201,000 shares of RM1 each in the hotel company. The hotel company, however, not only acquired the hotel properties but also acquired the whole share capital of the Merlin Hotel Ltd of which the respondent held 98,000 shares of RM10 each. For this acquisition the hotel company issued to the respondent in exchange 1,482,000 fully paid up shares of RM1 each. This deal resulted in a surplus of RM494,000. The facts further showed that the hotel company was thereafter listed in the Stock Exchange and following that the respondent sold his 1,482,000 shares therein and made a profit of RM288,332.86.

The Comptroller-General found that the surpluses that allegedly accrued to the respondent in the four transactions aforesaid attracted income tax under s. 10(1)(a) of the Income Tax Ordinance 1947, and accordingly assesed the same to tax. On appeal, the Special Commissioners upheld the assessments, but on further appeal, Harun J. revised the findings and order of the Special Commissioners. The Comptoller-General has since appealed. Before the Federal Court, questions *inter alia* arose as to:

(i) whether the transaction with the EPF Board was a sale or whether it was a loan transaction.

(ii) whether the said surpluses were earned by the respondent as a result of its carrying on a trade or a business.

Held:

[1] In construing tax matters, a document must be construed in the ordinary way. If on its true construction it falls within a certain taxing category, then it is taxed. If on its true construction it falls outside the taxing category, then it escapes tax.

[1a] The Special Commissioners applied the above principle and came to the conclusion that the three agreements herein (between the respondent and the EPF Board) constitute a sale, a lease and an agreement to repurchase the properties. The construction of these documents does not only involve a matter of the words or form used in the agreement but above all the method employed by the parties in the transaction. The modus operandi adopted was clearly based upon the assumption that it was a sale. Thus there is no way in which the Special Commissioners could find the transaction to be otherwise. The Special Commissioners' finding that the transaction with the EPF Board was a sale was correct.

[2] What the respondent in fact did in this case was that it acquired a building site, built on it a hotel and when completed sold the properties at a fabulously big profit. These activities which began in early 1956 by the acquisition of the site of the hotel properties and ended on 31 May 1963 when it was finally sold was in line with the respondent's memorandum of association. The sale of the right to repurchase the hotel properties to the hotel company at such a high price (RM4,201,000) when the respondent paid nothing for it, it having been obtained purely as a package deal from its transaction with the EPF Board, was correctly considered by the Special Commissioners as a scheme for profit making.

[3] The evidence clearly showed that respondent was trading in lands. Having regard to the objects of the respondent, and what it did with respect to lands it acquired from Mr. Lim Foo Yong, who is the respondent's alter ego, as well as what it did with regard to Hotel Merlin and its lands, we are satisfied that there is evidence to justify the finding by the Special Commissioners that the respondent was carrying on a business of land dealing and that the surpluses obtained therefrom were gains derived from such business.

[4] As a matter of law the exchange of shares between a shareholder of a taken-over company and the taking-over company constitutes a transaction of sale and purchase at the same time. The shareholder sells his investment in the taken-over entity at the same price at which he buys the shares in the taking-over company. As far as the taking-over company is concerned the cost of the investment which it takes over is the nominal value of its shares which it issued as a consideration for the investment, and as far as the shareholder is concerned, that value is what he realised from the sale of the investment. The difference of what cost him to acquire the investment and what he gets in return when he sells it, plus or minus, represents his profit or loss on the take over investment.

[4a] The Special Commissioners found that the surpluses made by the respondent in respect of the share transaction were surpluses arising from a scheme of profit-making. On the facts, we found no ground upon which we could say that the Special Commissioners' findings are not supported by evidence.

[Appeal allowed. Findings of Special Commissioners restored.]

Cases referred to:
Californian Copper Syndicate (Limited and Reduced) v. Harris (Surveyor of Taxes) 5 TC 159
Spiers and Son Limited v. Ogden (HM Inspector of Taxes) 17 TC 117
St. Aubyn Estates Ltd. v. Strick (HM Inspector of Taxes) 17 TC 412
Duke of Westminster v. CIR 19 TC 490
Craddock (HM Inspector of Taxes) v. Zevo Finance Co. Ltd. 27 TC 267
Henley v. Murray (Inspector of Taxes) [1950] 1 All ER 908
Commissioners of Inland Revenue v. Wesleyan and General Assurance Society 30 TC 11
Glenboig Union Fireclay Co. Ltd. v. CIR 12 TC 427
Royal Insurance Company Limited v. Stephen (HM Inspector of Taxes) 14 TC 22

Legislation referred to:
Income Tax Ordinance 1947, s. 10(1)(a)

For the appellant - Zulkifli bin Ahmad Makinudin, FC
For the respondent - J. Puthucheary; Skrine & Co.

JUDGMENT

Salleh Abas FJ:

This appeal arose from two notices of additional assessments of income tax for the years of assessment 1963 and 1964 made upon the respondent on 1 July 1967 in respect of four sums of money, i.e. (i) RM2,622,510; (ii) RM4,201,000; (iii) RM494,000; and (iv) RM288,332.62 which the Comptroller-General of Inland Revenue held to be profits from trade and therefore attracted income tax under s. 10(1)(a) of the Income Tax Ordinance 1947, being the law in force at the material time.

On appeal by the respondent the Special Commissioners upheld the assessments, but on further appeal to the High Court by the respondent, Harun J reversed the findings and the deciding order of the Special Commissioners. No reason either oral or written was given by the learned Judge for his decision.

The Comptroller-General then appealed to the Federal Court.

***The Facts*:**

The respondent is an alter ego of Mr. Lim FooYong, a man with many business interests and whose special inclination was hotel and restaurant business. The respondent was incorporated on 8 April 1954 as the family concern having a number of independent objects. Under Mr. Lim Foo Yong's management and directorship the respondent undertook several activities, such as buying and selling lands and even dealt with in wallpaper and acted as an agent for the sale of certain lands. But its biggest and the most important activities were related to the construction and sale of Hotel Merlin.

Initially Mr. Lim Foo Yong owned and at first ran a small hotel called Harlequin Hotel situated along Jalan Bukit Bintang, Kuala Lumpur. He planned to expand this hotel by making provision for a car park and servants' quarters and so acquired some lands adjoining to the hotel. But in early 1956 he abandoned the expansion plan in preference for building an entirely new modern hotel on a different site. It was in pursuance of this plan that the respondent purchased five pieces of land at Jalan Treacher, Kuala Lumpur on which the Hotel Merlin now stands. Hotel construction began in 1957 and was completed in 1959 at a cost of RM2,377,490 of which RM2,000,00 was borrowed from the EPF (Employees Provident Fund) Board to which the Hotel Merlin and its lands were charged. Two subsidiary companies were involved in the management and running of the hotel. The first subsidiary, formed in 1959

and called the Hotel Merlin Ltd., in which the respondent held 90% interest in the form of 98,800 fully paid up shares of RM10 each, took a lease of the whole building and lands from the respondent to run and manage the hotel. The second subsidiary company, formed in 1957, was Harlequin Ltd. in which the respondent held 50% interest. This company took a sub-lease of a hotel restaurant from the Hotel Merlin Ltd. and ran it under its own name.

On 30 March 1962 the respondent entered into a deal with the EPF Board in which three separate documents were simultaneously signed. The first document is an agreement stating that the Hotel Merlin and its lands were sold to the EPF Board for RM5,000,000. The second document is an agreement saying that the respondent had a right to repurchase the hotel building and its lands ten years later at the same price of which RM1,000 was paid as a deposit. The third document is a memorandum of lease whereby the EPF Board, then as the new owner of the hotel building and lands leased the properties to the respondent. The difference between the building cost (RM2,377,490) and the sale price (RM5,000,000) gives a surplus of RM2,622,510, which was treated by the Comptroller-General as taxable. It is the first item under appeal.

On 31 May 1963, i.e. just fourteen months later, the respondent entered into an arrangement with a newly incorporated company which was formed to run and manage this hotel. The company was called The Merlin Hotels Malaysia Limited (referred to in the case stated as well as in this judgment as the hotel company). By this arrangement the respondent sold to the hotel company its lease and its rights to repurchase the hotel properties which it obtained under the 1962 agreements with the EPF Board. The hotel company also brought over in so far as this case is concerned, the respondent's interest in the Hotel Merlin Ltd. and the Harlequin Ltd. The consideration for these sales were settled by the hotel company by the issue of its shares to the respondent. Thus by this arrangement the respondent had completely divested itself of all its rights and interests in the ownership of the Hotel Merlin, and became a fairly substantial shareholder in the hotel company which now owns the hotel. The sale of the rights to re-purchase was for a total consideration of RM4,201,000 and this was satisfied by the issue of 4,201,000 shares of RM1 each of the hotel company. As this right was obtained by the respondent from the EPF Board at no cost at all, the consideration was treated by the Comptroller-General and agreed to by the Special Commissioners as another surplus, subject to taxation, the second item under this appeal.

On 31 May 1963, i.e. just fourteen months later, the respondent entered into an arrangement with a newly incorporated company which was formed to run and manage this hotel. The company was called The Merlin Hotels Malaysia Limited (referred to in the case stated as well as in this judgment as the hotel company). By this arrangement the respondent sold to the hotel company its lease and its rights to repurchase the hotel properties which it obtained under the 1962 agreements with the EPF Board. The hotel company also bought over in so far as this case is concerned, the respondent's interest in the Hotel Merlin Ltd. and the Harlequin Ltd. The consideration for these sales were settled by the hotel company by the issue of its shares to the respondent. Thus by this arrangement the respondent had completely divested itself of all its rights and interests in the ownership of the Hotel Merlin, and became a fairly substantial shareholder in the hotel company which now owns the hotel. The sale of the rights to re-purchase was for a total consideration of RM4,201,000 and this was satisfied by the issue of 4,201,000 shares of RM1 each of the hotel company. As this right was obtained by the respondent from the EPF Board at no cost at all, the consideration was treated by the Comptroller-General and agreed to by the Special Commissioners as another surplus, subject to taxation, the second item under this appeal.

The 1962 agreements with the EPF Board and the 1963 arrangement with the hotel company clearly show that the respondent sold the Hotel Merlin and its lands twice. The first sale to the EPF Board being in the nature of provisional sale was not final, as the respondent still held the right to repurchase the properties at the end of the next ten years. It is only after this right was sold to the hotel company that the respondent had finally and decisively disposed of the hotel and its lands. This was the second or the final sale. From this two-tier sale, the respondent raked a total profit of RM6,823,510 being the aggregate of the above two surpluses (RM2,622,510 + RM4,201,000).

As regards the other two surplus items which were the subject of the assessment, these arose in the following way: The hotel company did not only acquire the hotel properties, but also acquired amongst other things the whole share capital of the Merlin Hotel Ltd. of which the respondent held 98,800 shares of RM10 each. For the acquisition of these shares, the hotel company issued to the respondent in exchange thereof 1,482,000 fully paid up shares of RM1 each. This deal resulted in a surplus of RM494,000 (RM1,482,000 - RM988,000), the third item under this appeal.

After the hotel company was publicly listed in the Stock Exchange, the respondent sold 1,481,000 units of these shares at different prices for a total price of RM1,769,332.62, thus giving it another surplus of RM288,332.62, the fourth item under this appeal.

The total of these two surpluses is RM782,332.62. Like the sale of the hotel properties being carried out at two different stages, these two surpluses represent the profits earned by the respondent from the sale of its shares in Merlin Hotel Ltd., also at two different stages; the first stage being the sale of its shares in the Merlin Hotel Ltd. to the hotel company, which took over the hotel, whilst the second stage being the sale of the exchanged shares to various people after the public listing of the hotel company in the Stock Exchange.

***The Issues*:**

Section 10(1)(a) of the Income Tax Ordinance No. 48 of 1947 under which income tax was imposed on the respondent enacted:

> 10(1) Income tax shall, subject to the provisions of this Ordinance, be payable at ... upon **the income** of any person accruing in or derived from ... in respect of:
>
> (a) **gains or profits from any trade, business**, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;
>
> (The emphasis is ours)

Thus the issue which the Special Commissioners had to decide in this case was whether these four surpluses were income of the respondent, being "gains or profits from any trade or business" within the meaning of para. (a) of subsection (1) of s. 10. If they were, they were taxable and if they were not, they were not subject to taxation.

The distinction between a gain derived from the sale of assets and that derived as a result of a trade or a business was succinctly stated by Lord Justice Clerk in *Californian Copper Syndicate (Limited and Reduced) v. Harris (Surveyor of Taxes)* 5 TC 159, 165 as follows:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

His Lordship went further and said:

> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determine being - Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

Applying the above test on the facts found by the Special Commissioners came to the conclusion that having regard to the object clauses contained in the memorandum of association and the conduct of the respondent as revealed in its numerous activities the respondent was carrying on a trade or a business of dealing in lands and shares and as such these surpluses were income subject to taxation under s. 10(1)(a) of the Ordinance.

The question whether or not the respondent was trading or carrying on a business is a question of fact. In *Spiers and Son Ltd. v. Ogden (HM Inspector Taxes)* 17 TC 117 Finlay J said at p. 124:

> It seems to me that the question whether a particular trade is or is not carried on must inevitably be a question of fact because it must be a question of degree. You are considering whether some particular transactions do or do not amount to a carrying on of a trade.

See also *St. Aubyn Estates Ltd. v. Strick (HM Inspector of Taxes.)* 17 TC 412, 419.

That being the case the appeal to the High Court and to us should therefore be limited only to the question, as correctly stated at para. 8(1) of the case, as to whether "there was evidence upon which the Special Commissioners who heard the appeal could have properly arrived" at the decisions set out in their deciding order.

(a) *The surplus of RM2,622,510 and the surplus of RM4,201,000 - Sale of Hotel Properties:*

Counsel for the respondent submitted that the transaction with the EPF Board was in substance a loan and not a sale. He also contended very strenuously that effect should be given to the statement made by the Minister of Finance in Parliament on 4 August 1962 to the effect that the transaction was in essence a loan at 7.2% interest per annum.

The Minister's statement is certainly not an evidence of facts, but merely an expression of opinion of what the Minister thought the transaction was. It is not known upon what facts the opinion was expressed. However, in the absence of any evidence to the contrary, we must assume that the opinion was based upon the same facts as were before the Special Commissioners. Surely such opinion was no more binding upon them as the Counsel's submission was. The Special Commissioners, being Judges of facts, were entitled to draw their own conclusion from facts found by them, otherwise their functions under the Statutes would be rendered nugatory. In fact the Special Commissioners did not reject the Minister's statement outright, and only after giving careful thought and consideration to it, did they conclude that they did not feel "disposed to wholly ignore the legal effect of the memorandum of lease", i.e. the third constituent document in respect of the transaction with the EPF Board. We are therefore unable to accept Counsel's submission that the Special Commissioners did not consider the Minister's statement. To consider a piece of evidence does not necessarily mean to accept it. The decision to accept or to reject it depends upon the probative value which the tribunal concerned would place upon such piece of evidence. In this case apart from the legal effect of the memorandum of lease, the Special Commissioners found two other circumstances which compelled them not to give weight to the Minister's opinion. The first was the alleged rate of interest for the alleged loan of RM5,000,000 whilst the second was the report of the respondent's own auditors.

If the annual rental of RM371,400 which the respondent had to pay to the EPF Board pursuant to the lease were treated as interest for the alleged loan, the rate of interest would be much higher than 7.2% per annum, the rate alleged by the Minister to be the rate of interest for the alleged loan. At 7.2% per annum on the capital of RM5,000,000, the yearly interest would be RM360,000 (7.2% x RM5,000,000) only, thus leaving a balance of RM11,400 (RM371,400 - RM360,000) unaccounted for.

As regards the auditors' report, on p. 10 of Part III of the appeal record (referred to as P4 by the Special Commissioners) in no uncertain terms the auditors regarded the transaction as a sale. Paragraph 1 of the report said:

> The Hotel Merlin was **sold** to the EPF Board as follows:
>
> The surplus from **sale** has been transferred to Surplus from Sale of Properties Account in the Balance Sheet.
>
> By the **agreement of sale** dated 30 March 1962, the EPF Board ...
> (The emphasis is ours)

In view of these circumstances, we do not therefore think that any challenge could be made against the Special Commissioners' decision not to give any weight to the Minister's statement of opinion.

We now come to the question whether the transaction was a sale or a loan. It is recalled that the transaction consisted of three constituent documents signed on the same day - a sale agreement, a repurchase agreement and a memorandum of lease. Whether these three documents were to be read separately or together as one document, the legal effect in our view should be the same. The Special Commissioners read these three documents together as a whole and we think that this procedure is right because the transaction was in fact one transaction. But the question is whether these documents mean what they say or otherwise than what they say.

Counsel for the respondent submitted that these documents in substance constituted a loan and not a sale, as if the substance is different from their legal effect. This submission, in our view, is misconceived because it is based upon "the supposed" doctrine of substance which was exploded by the House of Lords in *Duke of Westminster v. CIR* 19 TC 490, 520 and a number of other cases. However, as Lord Greene MR in *Craddock (HM Inspector of Taxes) v. Zevo Finance Co. Ltd.* 27 TC 267, 279 said "its ghost still walks on occasions", Counsel's submission appears to be another attempt to revive this supposed doctrine. The doctrine arose from the misunderstanding of the language used in earlier cases and judicially it is only a principle of construction and it means no more than the inconclusiveness of the words used by the parties in their documents. The substance is no more or no less than that which (paraphrasing Lord Tomlin in *Duke of Westminster's* case (*supra*) at p. 521) "results from the legal rights and obligations of the parties ascertained upon ordinary legal principles". This supposed doctrine of substance received further clarification from Sir Raymond Evershed MR in *Henley v. Murray (Inspector of Taxes)* [1950] 1 All ER 908, 910 in that "the Court is not entitled, having found what legal result the parties have in truth produced, to disregard that truth because the Court thinks that the result which has been achieved could have been achieved in some other way and that other way would have been less convenient to the subject in the matter of taxes. The Court is bound, having arrived at a conclusion what in truth the legal result was, to that result the taxing statutes as they are found to be.

As the supposed doctrine of substance is only a matter of construction, the following passage in the judgment of Lord Greene MR in *Commissioners of Inland Revenue v. Wesleyan and General Assurance Society* 30 TC 11, 16 is very relevant:

It is perhaps convenient to call to mind some of the elementary principles which govern cases of this kind. The function of the Court in dealing with contractual documents is to construe those documents according to the ordinary principles of construction, giving to the language used its normal ordinary meaning save in so far as the context requires some different meaning to be attributed to it. Effect must be given to every word in the contract save in so far as the context otherwise requires.

Another principle which must be remembered is this. In considering tax matters a document is not to have placed upon it a strained or forced construction in order to attract tax, nor is a strained or forced construction to be placed upon it in order to avoid tax. The document must be construed in the ordinary way and the tax legislation then applied to it. If on its true construction it falls within a certain taxing category, then it is taxed. If on its true construction it falls outside the taxing category, then it escapes tax.

The Special Commissions applied the above principle and came to the conclusion that these three documents constitute a sale, a lease and an agreement to repurchase the properties. The construction of these documents does not only involve a matter of the words or form used in the agreements but above all the method employed by the parties in the transaction. The *modus operandi* adopted was clearly based upon the assumption that it was a sale. Thus there is no way in which the Special Commissioners could find the transaction to be otherwise, short of tearing off these documents or ignoring them altogether.

As to the respondent's explanation that the transaction was documented in the form of sale rather than of loan because of certain legal technicalities and benefits we do not think that they only amount to a motive which had no effect on the legal consequence. It may well be that sale was entered into instead of a loan, because the EPF Board had also no power to run and invest in a hotel business. Thus technicalities cut both ways, and in any case motive is completely irrelevant.

We therefore think that the Special Commissioners' finding that the transaction with the EPF Board was a sale was correct.

But the question does not end there because these surpluses are not liable to taxation unless they were earned by the respondent as a result of its carrying on a trade or a business.

***The Carrying on of a Trade or a Business*:**

The respondent was incorporated for the purpose of acquiring and taking over all the properties of Mr. Lim Foo Yong. It was some sort of a family company; he and his wife and their children being the shareholders. But the respondent has an exceedingly wide scope of operation. Its powers of dealing with lands are contained in paras. (2), (3) and (4) of clause 3 of its memorandum of association which are as follows:

(2) To purchase for investment or resale, and to traffic in land and house and other property of any tenure and any interest therein, and to create, sell, and deal in freehold and leasehold ground rents, and to make advances upon the security of land or house, or other property, or any interest therein, and generally to deal in, traffic by way of sale, lease, exchange, or otherwise with land and house property and any other property real or personal, movable or immovable.

(3) To acquire by purchase, lease or exchange or otherwise land and buildings of any tenure or description and to turn the same to account as may seem expedient, and in particular by preparing building sites and by constructing, reconstructing, altering, improving, decorating, furnishing and maintaining offices, flats, houses, factories, warehouses, shops, wharves, buildings, works and conveniences of all kinds, and by consolidating or connecting or subdividing properties and by leasing and disposing of the same and to manage lands, buildings and other property whether belonging to the company or not, and to collect rent and income.

(4) To lease, sublease, sub-sublease or sublet all or any of the lands, houses and other real and personal, movable and immovable property of the company and to cancel or accept surrenders of leases, subleases and other rights and privileges and to develop all or any of the company's property, real or personal, movable or immovable, and to advance to or enter into contracts and arrangements with contractors, lessees, tenants and others, to construct or cause to be constructed any works necessary or suitable for developing, turning to account, or increasing the value of any property of the company.

What the respondent in fact did in this case was that it acquired a building site, built a hotel on it and when completed sold the properties at a fabulously big profit. These activities which began in early 1956 by the acquisition of the site of the hotel properties and ended on 31 May 1963 when it was finally sold was particularly authorised and contemplated by para. (3) of clause 3 of the respondent's memorandum of association. The sale of the right to repurchase the hotel properties to the hotel company at such a high price (RM4,201,000) when the respondent paid nothing for it, it having been obtained purely as a package deal from its transaction with the EPF Board, was correctly considered by the Special Commissioners as a scheme of profit making, paraphrasing no doubt the words of Lord Buckmaster in *The Rees Roturbo Development Syndicate, Limited v. Ducker* 13 TC 366, 389. The lease which the respondent had from the EPF Board was transferred to the hotel company at a nominal consideration of RM1 only despite the fact that it had another nine years to run. The Special Commissioners appropriately observed that if it had not been for the profit making scheme, the respondent would have resolved to accept a similar consideration, i.e. nominal consideration, for the transfer of the right. Such being the case, we cannot find any fault with the Special Commissioners' finding.

In addition to these transactions, the respondent's dealings with the lands formerly owned by Mr. Lim Foo Yong constituted a clear evidence that the respondent was trading in lands. Before the formation of the respondent Mr. Lim Foo Yong owned a small hotel called Harlequin Hotel situated on lots 652 and 654 at Jalan Bukit Bintang, Kuala Lumpur. He planned to expand this hotel by providing a car park and servants' quarters and towards this end acquired four other pieces of lands in the neighbourhood, i.e. lots 172, 275, 279 and 280. In early 1956 the plan for hotel expansion was abandoned and the two pieces of land on which the Harlequin Hotel stood were subsequently transferred to the respondent, who in turn sold them at a profit. The Special Commissioners held that the acquisition of these lands by the respondent could not be for the purpose of investment, i.e. hotel expansion, because at the time of acquisition by the respondent plans for hotel expansion had already been abandoned. The subsequent sale of the lands was therefore not a mere realisation of assets but the result of the respondent's carrying on a business in land dealings.

As regards the four other lots acquired by Mr. Lim Foo Yong for the purpose of hotel expansion, i.e. lots 172, 275, 279 and 280, these were transferred to the respondent on 13 June 1955 and 30 September 1955, more than a year after the respondent was incorporated, despite the fact that one of the avowed purposes of the respondent's incorporation was to take over Mr. Lim Foo Yong's properties. These four lots were sold subsequently at profits.

The respondent also acquired a shop-house at No. 64, Jalan Raja Laut, Kuala Lumpur from Mr. Lim Foo Yong in September 1955 and sold it in April 1956 at a profit.

The land dealings are clearly authorised and contemplated by Clause 3(2) of the respondent's memorandum of association as trafficking in land.

Thus having regard to the objects of the respondent, and what it did with respect to lands it acquired from Mr. Lim Foo Yong and what it did with regard to Hotel Merlin and its lands, we are satisfied that there is evidence to justify the finding by the Special Commissioners that the respondent was carrying on a business of land dealing and that the surpluses obtained therefrom were gains derived from such business.

Counsel for the respondent argued strenuously that as the hotel properties were treated in the balance sheets of the respondent for the years ending 1959, 1960 and 1961 as fixed assets, the hotel properties were therefore not stock-in-trade and as such their sale could not amount to a trading. With respect we cannot agree to this submission. The treatment or the categorising of any particular item of assets in a taxpayer's accounts may well indicate by the taxpayer's activities, but such inclusion is not conclusive as to whether the taxpayer is trading or not, it being merely a factor to be taken into consideration. The respondent's Counsel's submission could be met by equally inconclusive facts in that the Special Commissioners found that the respondent charged expenses relating to hotel construction to revenue account and that after the sale of the hotel properties the respondent did not treat the surpluses from the sale as capital reserves - see balance sheets as at 31 December 1962 and 31 December 1963.

In *St. Aubyn Estates'* case (*supra*) notwithstanding the fact that the taxpayer throughout treated the proceeds of the sale of lands as transactions in capital account and that no portion of these profits was distributed to the shareholders, Finlay J upheld the finding of the Special Commissioners that in selling the lands the taxpayer was trading and the gains derived from it were profits resulting from such trading. Similarly in *The Glenboig Union Fireclay Co. Ltd. v. CIR* 12 TC 427 notwithstanding certain payments received by the taxpayer were included by the taxpayer in its trading accounts the House of Lords held that such payments were capital receipts instead of revenue receipts. Thus as a matter of law inclusion of an item of expenditure or receipt in a particular account is not conclusive of the nature of the item concerned. What is conclusive is its legal nature and substance, and not the place where it is placed or entered in the accounts.

(b) *The surplus of RM494,000 and the surplus of RM288,332.62:*

The respondent is especially authorised to deal in shares by para. (20)(d) and para. (32) of clause 3 of its memorandum of association. These are as follows:

> (20) (d) To purchase or otherwise acquire, issue, re-issue, sell, place and deal in shares, stocks, bonds, debentures and securities of all kinds, and to give any guarantee or security for the payment of dividends or interest thereon or otherwise in relation thereto.
>
> (32) To sell, dispose of or transfer the business, property and undertaking of the company or any part thereof for any consideration which the company may see fit to accept and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of this company.

As a matter of law the exchange of shares between a shareholder of the taken-over company and the taking-over company constitutes a transaction of sale and purchase at the same time. The shareholder sells his investment in the taken-over entity at the same price at which he buys the shares in the taking-over company. As far as the taking-over company is concerned the cost of the investment which it takes over is the nominal value of its shares which it issued as a consideration for the investment, and as far as the shareholder is concerned, that value is what he realised from the sale of the investment. The difference of what cost him to acquire the investment and what he gets in return when he sells it, plus or

minus, represents his profit or loss on the take-over investment: *Craddock v. Zevo Finance Co. Ltd.* (*supra*) at pp. 278 and 287. In *The Royal Insurance Company Limited v. Stephen (HM Inspector of Taxes)* 14 TC 22 Rowlatt J held that when a company surrendered its stocks in an old company in exchange for stocks in a new company such surrender was in fact a realisation of the old stocks.

Thus the only question remaining to be considered here is whether these surpluses which arose from share dealings were the results of the respondent's carrying on a business. The Special Commissioners found that these surpluses arose from a scheme of profit-making, consistent with the objects contained in its memorandum of association. They remained completely unimpressed by the respondent's justification for the disparity between the nominal value and the take-over value of the respondent's shares in Hotel Merlin Ltd. as being occasioned by a goodwill premium because there was no valuation report on the matter.

In view of the memorandum of association of the respondent and what it did in order to gain these surpluses, we found no ground upon which we could say that the Special Commissioners' findings are not supported by evidence.

The Special Commissioners also found a number of activities which strengthened their findings that the respondent was carrying on a trade or a business and that these surpluses were the result of its business activities. For example, between 1956 and 1957 the respondent acted as an agent for Peninsular Realty Ltd. in respect of certain land transactions. On other occasions the respondent even carried on a business of dealing in wall-paper. But of all these activities its most important activities seemed to be connected with lands.

Conclusion:

Essentially the appeal by the respondent against the decision of the Special Commissioners, as heard by Harun J in the Court below, was an appeal against the findings of facts by the Special Commissioners. In determining the question whether these surpluses, the subject matter of this appeal, were the results of the respondent's business activities or whether they were merely realisations of investments, the Special Commissioners applied the correct legal test and came to the conclusion that they were the results of the respondent's business activities. The Court thus cannot exercise an original jurisdiction in such questions, as this is purely a matter of facts for the Special Commissioners to decide. We have not been shown how and why the learned Judge upset these findings, nor have we been shown that the Special Commissioners erred in law or even in fact in arriving at those findings and conclusion.

We therefore allow the appeal by the Comptroller-General and restore the findings and the deciding order of the Special Commissioners with costs. The deposit, if paid, should be refunded to the Comptroller-General.

Also found at [1982] CLJ 459